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In the Supreme Court of the United States

OCTOBER TERM, 1978

BIG THREE INDUSTRIAL GAS & EQUIPMENT CO., INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A9-A34) is reported at 579 F. 2d 304. The decision and order of the National Labor Relations Board (Pet. App. A35-A92) are reported at 230 N.L.R.B. 392.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7-A8) was entered on September 15, 1978. A motion for rehearing was denied on October 27, 1978 (Pet. App. A6). The petition for a writ of

certiorari was filed on January 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging all of its maintenance department employees following acts of misconduct by unidentified persons in the department where the dominant motivation for the discharge was anti-union animus.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. A1-A2.

STATEMENT

In the summer of 1976,[1] a union organization drive took place at the Company's Bayport plant. On July 14 and 15, twenty-seven employees—primarily from the maintenance department—signed authorization cards with the Union.[2] Ultimately, 33 of the 35 maintenance department employees signed such cards (Pet. App. A47-A48, A64, A10-A11). The Company responded by interrogating employees, threatening them with discharge, and promising benefits to employees to discourage unionization (Pet. App. A49-A59).

[1] All dates are in 1976.

[2] Oil, Chemical and Atomic Workers International Union, AFL-CIO.

On August 17, three maintenance department employees broke a Company rule by leaving the premises while on overtime without punching out or notifying their supervisor. Two employees who were union adherents were suspended for three days; the third, who was not a union supporter, was not disciplined. He was told by a supervisor not to worry because "we're not after you." (Pet. App. A36-A37, A61-A62.)

In this same period, two pieces of machinery were vandalized and parts to a turbine under repair by the maintenance department disappeared. Repair and replacement of these items cost several thousand dollars. (Pet. App. A64-A65.) On August 19, some time after these incidents occurred, supervisory personnel received threatening anonymous telephone calls and one supervisor had shots fired at his house and found sugar in the gas tanks of his cars (Pet. App. A65). On August 19 and 20, the Company received anonymous[3] bomb threats to its plant. No further incidents occurred between August 21 and 25. (Pet. App. A65-A69.) On August 25, the Company, without ascertaining who, if anyone, in the maintenance department was responsible for the incidents, or attempting to deal with these problems by other means,

[3] Although two telephone bomb threats were tape recorded, no conclusive identification of the caller was made. Two witnesses thought the voice was that of Union advocate Mike Robb. The Company's assistant maintenance manager thought it was Jim Bowlin, another maintenance employee who became a Company spy (Pet. App. A70-A74, A53-A55, A13 n.2).

discharged all 34 maintenance workers and subcontracted the work out (Pet. App. A75-A76, A82).

2. On these facts, the Board found that the Company violated Section 8(a)(1) of the Act by unlawfully interrogating, threatening, and promising benefits to employees "to discourage union activity"; and Section 8(a)(3) and (1) by discriminatorily suspending two pro-union employees (Pet. App. A36-A37). The Company does not dispute these findings here.

The Board further found that the Company violated Section 8(a)(3) and (1) by "terminat[ing] 34 employees, its entire maintenance work force, * * * in order to dissipate support for the Union" (Pet. App. A36). The Administrative Law Judge, whose decision in this respect was adopted by the Board, found that the reason asserted by the Company for the action—*i.e.*, a desire to rid itself of a workforce which had engaged in misconduct—was a pretext. He noted that the Company had (Pet. App. A82):

> failed to prove that it had reasonable cause to believe that members of the maintenance crew engaged in unprotected activity. [The Company] merely suspected some employees may have engaged in unprotected activity and chose to terminate all of them to end the Union activity and to possibly end the bomb threats and allied behavior.

He added that the pretextual nature of the reason assigned by the Company for the mass terminations is further revealed (*ibid.*):

> by the fact that it terminated all maintenance employees rather than just those it suspected in connection with the August 19th and 20th activities [and that it] knew that almost everyone in the maintenance department had signed union cards and it suspected that only a few employees in this department had been involved in the unprotected activity * * *.

The Board ordered the Company, *inter alia*, to reinstate the 34 unlawfully discharged employees, with back pay (Pet. App. A85-A86, A88).

3. The court of appeals enforced the Board's order (Pet. App. A33). The court found "abundant support" for the Board's finding that "anti-union animus pervaded the Company's action" in discharging its maintenance employees and subcontracting out the maintenance work (Pet. App. A29). Moreover, while the court found, contrary to the Board, that the Company was also motivated by an "honest business purpose" (Pet. App. A30) to rid itself of a workforce which it believed had engaged in misconduct, it further found that this business justification was not "dominant," but rather "subsidiary to the force of union animus in triggering the mass discharge" (Pet. App. A31). "Accordingly, the motivational predicate for § 8(a)(3) violations is established" (*ibid.*).[4]

[4] The court noted that there is disagreement among the circuits as to whether, in mixed motive situations, it is sufficient to show that the anti-union motive in part contributed to the decision or was at least "reasonably equal" to the lawful motive, or whether it is necessary to show that the decision

The court distinguished the situation here from that in *Johns-Manville Products Corp.* v. *NLRB*, 557 F. 2d 1126 (5th Cir. 1977), cert. denied, 436 U.S. 956 (1978), where it had upheld the employer's right to discharge all of its employees because of widespread acts of sabotage in the plant. The court noted that there, unlike here, the misconduct was so severe as "to become functionally equivalent to a strike" (Pet. App. A27). Moreover, in *Johns-Manville*, unlike here, there was a "complete absence of anti-union motivation" (Pet. App. A28), and the employer had "exhausted various alternatives before resorting to the unusual and severe solution of unit-wide job termination" (Pet. App. A31).

ARGUMENT

The Board found that the Company discriminated against its maintenance employees, in violation of Section 8(a)(3) and (1) of the Act, by discharging them and subcontracting out their work as a reprisal for their union activity, rejecting as a pretext the Company's contention that it was motivated by a desire to rid itself of a workforce which had engaged in misconduct. The court of appeals found that, while the latter consideration did in fact play a part in the Company's decision, the dominant consideration was the employees' union activity—*i.e.*, the business justification was "subsidiary to the force of union animus

would not have been made "but for" the anti-union considerations. The court concluded that "even a 'but for' test would be met in the instant case." (Pet. App. A30-A31 n.15.)

in triggering the mass discharge" (Pet. App. A31); accordingly, it sustained the Board's unfair labor practice determination. The basic question presented is whether substantial evidence supports that determination. Such an issue does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, there is ample record support for these findings (see Pet. App. A29).

In an effort to present a legal question for review, petitioner contends that this Court should resolve the disagreement among the circuits as to whether a "but for" or a less stringent test applies in mixed motive cases under the National Labor Relations Act (Pet. 13-24). However, as the court of appeals properly found (note 4, *supra*), there is no need to reach that issue here, for the evidence of anti-union motivation is sufficient to satisfy even the more stringent "but for" test.[5] Moreover, since the misconduct occurred in the course of the employees' union activity, the Company, even if motivated solely by a desire to stop

[5] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), has no bearing on the issue raised here. There, the Court ruled that if a defendant rebuts a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964 by presenting a legitimate business justification for its employment decision, the burden shifts to the plaintiff to show that the "business justification" is a pretext for a discriminatory motive. Here, the Company's business justification was insufficient to rebut the evidence showing that the discharges would not have occurred "but for" the employees' union activity. The evidence clearly established anti-union animus, which predominated over the Company's showing.

such misconduct, could not lawfully discharge all the employees, but only those who were identified as having engaged in the wrongdoing. See *Stewart Die Casting Corp.* v. *NLRB*, 114 F. 2d 849, 856 (7th Cir. 1940); *NLRB* v. *Mt. Clemens Pottery Co.*, 147 F. 2d 262, 268 (6th Cir. 1945). See also *NLRB* v. *Burnup & Sims*, 379 U.S. 21, 23-24 (1964). The Company made no attempt here, of course, to distinguish between the guilty and the innocent; it simply inflicted "punishment on the many for the misdeeds of a few" (Pet. App. A25).[6]

[6] Finally, there is no merit to petitioner's contention (Pet. 24-31) that the court of appeals impermissibly substituted a new standard for that utilized by the Board. While the court rejected the Board's finding that the Company's asserted motive for the discharges was "pretextual" (Pet. App. A-82), it nonetheless agreed with the Board that there was sufficient evidence of anti-union animus to warrant the conclusion that the discharges were violative of Section 8(a)(3) and (1) of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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